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No. 05-1655

IN THE

Supreme Court of the United States

KMART CORPORATION,

Petitioner,

v.

COUNTY OF STEARNS,

Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Supreme Court

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Minnesota Supreme Court and Tax Court Decisions Did Not Rest Upon the Resolution of a Factual Dispute; They Reinterpreted a Statute and Rendered It Unconstitutionally Vague.

The opposition brief incorrectly asserts that the primary issue in this case was a factual dispute about whether certain information was actually available to Kmart within the 60-day period. (Opp. Brf. 11.) This contention misstates the record. Nowhere in the Minnesota Supreme Court's decision is there any discussion of an alleged dispute about the availability of certain information.

In fact, it is undisputed that Kmart timely provided information to the County for its petition years at issue,[1] including information about its lease of the subject property and operating revenue information about the store it operates as a tenant of the subject property. Kmart was not able to provide the expense information held to be relevant to valuation of the real estate under well-established Minnesota Tax Court precedent-- vacancy rates, management fees and replacement reserves -- because that information was in the possession of a third party landlord, not Kmart, and therefore was "unavailable" to Kmart within the meaning of the 60-Day Rule. *See Kmart Corp v. County of Otter Tail,* 2000 WL 1719925 (Minn. Tax Ct. 2000) (holding that the "expenses attributable to the real estate include the vacancy loss, management fees and replacement reserves," all of

[1] Kmart filed petitions in 2000, 2001 and 2002 to challenge, respectively, the County's valuations of its property in 1999, 2000 and 2001.

which "are available to the Landlord, not the tenant"). App. at 135. Kmart also did not provide information about the expenses of operating its retail store at the subject property, including insurance, utilities and repair and maintenance expenses. Kmart did not produce this tenant-paid expense information because such information was not relevant to the valuation of the real estate, as determined by many prior Tax Court decisions. *See* pp. 7-8 of Kmart's Petition.

Stearns County thereafter moved to dismiss Kmart's action based on Kmart's alleged failure to produce information about the "expenses" for the subject property. Two categories of information were at issue: (1) information about "vacancy loss, management fees and replacement reserves," which the Tax Court had previously held *is* relevant and, if available, must be provided under the 60-Day Rule, but it is usually available only to the landlord, not a tenant; and (2) information about tenant-paid expenses including insurance, utilities, and repair and maintenance expenses, which the Tax Court previously held *are not* relevant to the valuation of the real property and which *do not* need to be provided under the 60-Day Rule.[2] As to the first category, Kmart argued in response to the County's motion to dismiss that the information was not available to Kmart because it

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[2] *See, Kmart Corp. v. County of St. Louis*, 2001 WL 40370 (Minn. Tax Ct. 2001) ("Since other operating expenses *including insurance, utilities and common area maintenance and repair expenses that are paid by the tenant* do not reduce the income to the landlord, those expenses are not relevant in calculating the value of the property. . . . Therefore, these other operating expenses do not need to be provided" under the 60-Day Rule.) Petitioner's App. at 142-43 (emphasis added).

was information that the landlord, not Kmart possessed, and therefore was unavailable for Kmart to provide under the 60-Day Rule. As to the second category, contrary to statements made in the opposition brief, Kmart did not argue that its information about the expenses of operating its store at the subject property, including insurance, maintenance and repair expenses, was unavailable. Instead, Kmart argued that such tenant-paid expense information was not relevant and had never been required to be produced under the 60-Day Rule, as evidenced by a lengthy and consistent series of Tax Court decisions.

Thus, the issue in the Minnesota Supreme Court, and in the Tax Court, was *not* whether information about "expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant" was available to Kmart; the issue was whether such tenant-paid expense information fell within the scope of the 60-Day Rule's undefined "income and expense" language, despite prior holdings from the Tax Court that it did not. Accordingly, the primary issue in this case did not turn on a factual dispute, but rather on a legal issue as to the meaning of undefined statutory terminology.[3]

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[3] The opposition brief's reference at n.2 to legislative testimony given by Mr. Wilhelmy in opposition to the 60-Day Rule before enactment is not in the record before this Court, is incorrectly cited, and bears no relationship to the issues on appeal.

II. The Opposition Brief Fails to Address the Inherent Vagueness of the 60-Day Rule.

The opposition brief first erroneously argues that the vagueness doctrine is limited to criminal statutes. However, the Due Process Clause applies to civil litigants as well as criminal defendants. This Court long ago rejected the notion that the vagueness doctrine applies only in the criminal context, saying "It [is] not the criminal penalty that [is] held invalid, but the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925).

The void for vagueness doctrine has been invoked in many non-criminal matters. In *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966), for example, a statute permitted a jury to impose a civil penalty in the form of court costs on the prevailing party in litigation, but failed to outline any criteria to be used by the jury in reaching its decision. The state appellate courts determined that the statute was not void for vagueness because "The Act 'is not a penal statute' but simply provides machinery for the collection of costs of a 'civil character' analogous to imposing costs in civil cases 'not as a penalty but rather as compensation to a litigant for expenses.'" *Id.* This Court rejected a purported distinction between civil and criminal matters, explaining "one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce." *Id.* at 403. The void for vagueness doctrine requires greater scrutiny in criminal statutes and statutes

which infringe upon constitutional rights, such as the right to petition the government for redress. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *cf Barenblatt v. U.S.*, 360 U.S. 109, 137 (1959) ("the 'vice of vagueness' is especially pernicious where legislative power over an area including speech, press, petition and assembly is involved"). (Black, J. dissenting, joined by Warren, C.J. and Douglas, J.)

The opposition brief next argues that the 60-Day Rule is not vague because it simply requires production of "relevant" evidence. However, the problem is that the decision below permits a county and its litigation experts to make their own subjective (and unpredictable) relevance determinations years *after* the expiration of the 60-Day Rule. The opposition brief never addresses the fatal flaw of the statute: the fact that the determination of what information is "relevant" and must be provided within 60 days is ultimately made by the county, which is an adverse party to the litigation, and its litigation expert witnesses, well *after* the 60-day period has expired.

The language in the decision of the Minnesota Supreme Court highlights the lack of objective criteria for the scope of the information that must be produced. In its syllabus, the court states that a taxpayer has to produce "sufficient information" about expenses paid by the taxpayer as a tenant. App. 3. In its central holding, the court goes on to state:

> We interpret the 60-day rule to require production of expense information that is *useful and relevant* to the appraisal process.

App. 11 (emphasis added). The inherent vagueness of the statute results from the fact that no objective criteria exist to determine what information is "sufficient," or what

information a county or its litigation expert will opine, after the fact, is "useful and relevant" to the appraisal process.

In this case, for example, a number of previous Tax Court rulings held that tenant-paid expenses, and in particular, utilities, insurance and maintenance and repair expenses, are *not* relevant to the valuation of the property. *See Kmart Corp. v. County of St. Louis*, 2001 WL 40370 (Minn. Tax. Ct. 2001) ("operating expenses including insurance, utilities, and common area maintenance and repair expenses that are paid by the tenant . . . are not relevant [and] do not need to be produced under the 60-day Rule"); *see also* cases cited on pp. 7-8 of the Petition.

Despite the holdings of those cases, Stearns County hired an expert witness for the present litigation, Dwight Dahlen, to opine that information about tenant-paid expenses -- in particular, utilities, insurance and maintenance and repair expenses -- *would be* useful and relevant to the appraisal of the landlord's real estate. However, that same expert previously testified as an expert on behalf of counties in many other property tax valuation disputes involving the same type of build-to-suit properties for Kmart, and Mr. Dahlen *never* used these types of tenant-paid expenses to determine property values in any of those prior cases, despite his affidavit in the present case that such information is relevant and necessary.[4] Instead, in each case involving the

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[4] In *Kmart Corp. v. County of Martin*, 2006 WL 771935 (Minn. Tax Ct. 2006) the data relied on by Mr. Dahlen to determine the value of the real estate in which Kmart leased space included vacancy and credit rates, the management fees paid, and reserves. In *Kmart Corp. v. Becker County*, No. CX-02-410 (Minn. Tax Ct. 2004) he valued the property *[footnote continued on following page]*

valuation of property under leases in which Mr. Dahlen has testified as an expert, he has analyzed only information about vacancy rates, credit losses, management fees and reserves in order to make valuation adjustments -- the very items that the Tax Court previously held are relevant and necessary to provide under the 60-Day Rule, but are in the possession of the landlord, and not of a tenant such as Kmart. *Kmart Corp v. County of Otter Tail,* 2000 WL 1719925 (Minn. Tax Ct. 2000) (holding that the "expenses attributable to the real estate include the vacancy loss, management fees and replacement reserves").

It is this kind of subjective relevance determination, made by hired litigation experts after the fact, that renders the statute unreasonably vague. What information is "sufficient" and what information would be "useful and relevant" to the appraisal process is limited only by the imagination of a county's litigation expert.

Before taking away a party's valuable rights, such as the right to petition the government for redress from unfair and unequal taxation, a statute must define, in objective terms, what the party must do to preserve its rights. Just as a statute

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again by considering "vacancy and credit loss" rates, "management fees" and "reserves." In *Kmart Corp. v. County of Crow Wing*, 2001 WL 826120 (Minn. Tax. Ct. 2001) he again relied on vacancy and credit loss rates. This is the landlord's information, not the tenant's. In ***none*** of the cases in which Mr. Dahlen has valued leased real property has he analyzed and adjusted for tenant-paid expenses such as insurance, utilities, repair and maintenance expense in order to determine the value of the real estate.

of limitations would be unreasonably vague if it permitted actions to be dismissed if filed untimely, but failed to identify any objective time limits for filing actions, so too the statutory 60-Day Rule, as reinterpreted by the Tax Court and Minnesota Supreme Court in this case, is unreasonably vague because it fails to provide objective criteria for what "expense" information a taxpayer must provide within 60 days to avoid dismissal.

III. The Opposition Brief Misstates Kmart's Arguments Concerning the Due Process Violation of Doing Away With the Doctrine of Precedent.

The opposition brief also misstates Kmart's arguments about the Minnesota Supreme Court's ruling that decisions of the Minnesota Tax Court have no precedential value. The opposition brief mischaracterizes Kmart's position as arguing that "an inferior court's decision has *stare decisis* effect in a state supreme court . . . ." (Opp. Brf. at 5.) However, Kmart has never argued that the Minnesota Supreme Court, or any other appellate court, is bound under the doctrine of precedent or *stare decisis* to follow decisions of inferior courts. Instead, the issue is whether it is a due process violation to declare that decisions of a court -- particularly a court like the Minnesota Tax Court, which is a "court of record" having "statewide jurisdiction," established by the Minnesota Legislature as the "sole, exclusive and final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state" (Minn. Stat. § 271.01, subd. 5) -- have no precedential effect.

The issue of the precedential effect of tax court decisions arose in the context of Kmart's claim that the decision of the Minnesota Tax Court in this case, as affirmed by the decision of the Minnesota Supreme Court, should be given prospective

application only because it established a different rule of law than previously has been consistently followed in the Tax Court. Minnesota has adopted the prospective ruling doctrine that this Court recognized in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). *See Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982). The Minnesota Supreme Court acknowledged that its decision, and the decision of the Tax Court in this case, departed from prior Tax Court decisions, App. 9, but concluded that the *Chevron* prospective ruling doctrine should not be applied to limit the application of the new rule to the existing case because "the decisions of the tax court do not qualify as precedent for purposes of retroactivity analysis." App. 17.

The Minnesota Supreme Court's declaration that the decisions of the Minnesota Tax Court have no precedential effect is a violation of due process because it strips away from litigants important procedural safeguards that are deeply rooted in the common law. The doctrine of precedent or *stare decisis* does not require one court rigidly to adhere to prior decisions of another court. It does protect a litigant's right to due process by at least forcing a court that departs from precedent to analyze and address contrary precedent. *Stare decisis* requires a court to explain the reason for its departure from precedent -- such as that the case involves distinguishing facts or that the rule announced in the prior decision is incorrect or should be changed. The doctrine of precedent or *stare decisis* permits the law to develop in an orderly and logical fashion, and provides a degree of certainty in the rule of law that people can rely upon as they plan their affairs.

Abolishing the doctrine of precedent within any court system -- particularly within a court system such as the Minnesota Tax Court which was established to have "statewide

jurisdiction" and the "sole, exclusive and final authority for the hearing and determination of all questions of law and fact arising out of the tax laws of the state" -- is a grave violation of due process. It fosters ad hoc and arbitrary decisions and contradictory rules of law. Statutes and rules would not have any understood meaning if different courts could adopt whatever interpretation they chose, without consideration of interpretations given in prior court decisions. Litigants would have no ability to determine their course of action in reliance upon any particular rule of law. No issue would ever be settled. Litigants could re-litigate any issue, despite the fact that prior decisions had resolved the issue the other way. It is because of these types of concerns that the doctrine of precedent has been entrenched in our nation's common law throughout its history. Abolishing the doctrine of precedent within the Minnesota Tax Court, and refusing to apply the *Chevron* purely prospective ruling doctrine to the recent change in statutory interpretation because Tax Court decisions have no precedential effect, as the Minnesota Supreme Court has ruled here, violated Kmart's due process rights.

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